

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

David Bicking,

Complainant,

vs.

R.T. Rybak for Mayor,

Respondent.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION

AND

NOTICE OF AND ORDER FOR
EVIDENTIARY HEARING

TO: Dave Bicking, [Street Address Redacted], Minneapolis, Minnesota 55407 and R.T. Rybak for Mayor, [Street Address Redacted], Minneapolis, Minnesota 55408.

On May 12, 2009, Dave Bicking filed a Complaint with the Office of Administrative Hearings alleging the Respondent violated Minn. Stat. § 211B.02 by disseminating campaign material that falsely states that Minneapolis City Councilperson Cam Gordon endorses or supports R.T. Rybak's candidacy for mayor of Minneapolis. After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the complaint sets forth prima facie violations of § 211B.02 by the Respondent.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a prehearing conference and evidentiary hearing to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101, before three Administrative Law Judges. The evidentiary hearing must be held within 90 days of the date the complaint was filed, pursuant to Minn. Stat. § 211B.35. You will be notified of the date and time of the prehearing conference and evidentiary hearing, and the three judges assigned to it, within approximately one week of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should bring with them

all evidence bearing on the case with copies for the Administrative Law Judge and opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, St. Paul, Minnesota 55101 or call 651/361-7900 (voice) or 651/361-7878 (TTY).

Dated: May 13, 2009

s/Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Respondent R. T. Rybak for Mayor (Respondent) is the official campaign organization for Minneapolis Mayor R. T. Rybak's re-election campaign. According to the Complaint, Respondent's campaign disseminated literature falsely claiming that Mayor Rybak has the support of Minneapolis City Council member Cam Gordon and that "the entire City Council" endorses him. The Complaint alleges that Mr. Gordon has not given written permission to Respondent to state that Mr. Gordon supports or endorses Mayor Rybak as required by Minn. Stat. § 211B.02. The Complaint further alleges that, on March 28, 2009, Mr. Gordon asked Respondent to remove his name as a supporter and that Respondent did remove Mr. Gordon's name from Respondent's website but continued to distribute campaign literature listing Gordon's name as a supporter.

Respondent's campaign literature includes a section titled "We Support Mayor R.T. Rybak" which has a subsection titled "City Council Members" listing, among others, Council Member Cam Gordon. In addition, the literature includes a quote from State Senator Scott Dibble stating "Mayor Rybak is endorsed by the entire City Council – that's historic."

The Complaint alleges that the Respondent knowingly violated Minn. Stat. § 211B.02 by stating in campaign literature that Mr. Gordon supports and endorses Mayor Rybak's candidacy although it lacked written permission to do so; and continued to violate Minn. Stat. § 211B.02 by distributing the literature with the false claim of support after Mr. Gordon requested that Respondent remove the claim of support from the campaign literature.

Minn. Stat. § 211B.02 provides in relevant part as follows:

211B.02 False Claim of Support.

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization.

In reviewing the Complaint to determine whether it sets forth a prima facie violation of the statute, this Office is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not "patently false" or "inherently incredible."¹

The Administrative Law Judge concludes that the complaint does allege sufficient facts to support finding prima facie violations of Minn. Stat. § 211B.02 as against Respondent. If the evidence at a hearing were to establish that the Respondent knowingly made the claim that Cam Gordon endorses Mayor Rybak without first obtaining Mr. Gordon's written permission to do so; and that Respondent continued to disseminate campaign literature with a claim of support on it after Mr. Gordon asked to have it removed, that may be a violation of Minn. Stat. § 211B.02. Pursuant to Minnesota Statutes § 211B.33, subd. 2(d), this matter shall be set on for an evidentiary hearing before a panel of three administrative law judges.

B.H.J.

¹ See, e.g., *Halverson v. Nelson*, OAH Docket No. 4-6301-16282-CV, slip op. at 2 (2004); compare also, *Elzie v. Commissioner of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) (Dismissal of a complaint is proper only if it appears to a certainty that plaintiff can introduce no facts consistent with the complaint to support granting the relief requested).